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TABLE OF AUTHORITIES

FEDERAL STATUTES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 746

A. L. MECHLING BARGE LINES, INC., ET AL.,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, et al.,
Defendants-Appellees.

Appeal From The United States District Court For The Northern District Of Illinois

MOTION TO AFFIRM

Come now defendants-appellees, McNabb Grain Company, Federal North Iowa Grain Company, Union Hill Farmers' Elevator, Neilsen Grain Company, Ferris Grain Company, Frank Gibbons Grain Company, Cahill Grain Company, Diemer Grain Company, Priscilla Farmers' Co-operative Company, Missal Farmers' Grain Company, Payne-Stotler Grain Company, Lostant Grain Company, and Isaac Barrett Grain Company, who were parties to proceeding before the Interstate Commerce Commission and interveners as defendants in the Court below and, pursuant to Rule 16 (1c) of the Revised Rules of this Court, move that judgment of the District Court be affirmed.

STATEMENT

The Jurisdictional Statement of the Mechling Barge Lines and others (on pp. 3-4) raises questions as to (1) the adequacy of the railroad rates; (2) the propriety of rates that will divert traffic from water carriers; (3) the refusal of the Commission to deny fourth section relief because the inbound rate factor to Kankakee is alleged to be non-compensatory; (4) the railroads would receive the haul from Chicago even if they were forced to relinquish the inbound haul to river transportation; (5) the Commission did not consider duly presented evidence; (6) the departure rate would violate other sections of the Interstate Commerce Act; and (7) the correctness of the Commission's conclusions.

The interest of these appellees as operators of small country elevators at points west of Kankakee on the New York Central Railroad is stated in their Motion to Affirm filed in connection with the Jurisdictional Statement of the Board of Trade of Chicago herein.

Appellant Mechling Barge Lines, Inc., as a water carrier of corn and other bulk freight, is exempt from rate regulation. Section 303 (b) of the Act to Regulate Commerce [49 U.S.C., Sec. 903 (b)]; *Mechling Barge Lines, Inc., Extension*, 306 I.C.C. 223, 225. The other appellants joined with it in its Jurisdictional Statement do not ship corn on the competitive rail rates involved herein, but are users of river transportation.

ARGUMENT.

Form of Publication of the Reduced Rail Rates.

Despite appellants' criticism (p. 7) of the form in which the rail rates in question were published, the combination method employed is one of the three ways of stating rates that are recognized by the statute. *St. Louis S. W. Ry. Co.* v. *United States*, 245 U.S. 136. Section 6 of the Act imposes no duty to publish single factor rates, and the Commission has plenary authority over the form and arrangement of tariffs. *Famechon Co.* v. *Northern P. Ry. Co.*, 23 F. (2d) 307, affirming 11 F. (2d) 312.

The Through Charges Are Compensatory.

While conceding the adequacy of the through rail rates as to which the Commission granted fourth section relief, appellants contend that the proportional factor to Kankakee is non-compensatory and that the profitableness of the through charge is due to the amount received from the reshipping rates applying beyond Kankakee. In this contention, appellants overlook the plain and unambiguous language of the governing statute.

Section 4 (1) makes it unlawful

> "for any common carrier * * * to receive any greater compensation *in the aggregate* for the transportation of * * * like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, * * * " (emphasis supplied)

No provision is made therein for separate consideration and treatment of particular segments of through charges, as it is in the case of Section 1 (5) where

> "every unjust and unreasonable charge for * * * service or *any part thereof* is prohibited and declared to be unlawful." (emphasis supplied)

Throughout its existence the Commission has held that the greater charge in the aggregate for a shorter than for a longer distance over the same line in the same direction is not to be determined by the proportion allotted to different roads on the line but by the rate as an entirety. *Imperial Coal Co.* v. *Pittsburgh & L. E. R.R. Co.*, 2 I.C.C. 618; *Detroit Board of Commerce* v. *Grand Trunk Ry. Co.*, 2 I.C.C. 315; *Board of R.R. Commrs.* v. *Atchison, T. & S. F. Ry. Co.*, 34 I.C.C. 111; and *Sheldon Axle & Spring Co.* v. *Lehigh V. R. Co.*, 53 I.C.C. 43.

The proportional rate to Kankakee, standing alone, presents no fourth section problem, since it applies alike from Moronts, the most distant origin, and every intermediate point. It is never collected separately in connection with the movement to Kankakee, but is applied as a part of the through charge to Eastern destinations and then only when outbound shipments are made from or through that point.

Appellants rely on the case of *Atchison, T. & S. F. Ry. Co.* v. *United States*, 279 U.S. 768, as supporting its position but, as the Commission points out in its report (p. 450) that case was one in which this Court condemned a railroad's attempt to increase a local rate to a transit point after the traffic was shipped out of that point by another railroad. No fourth section question was there involved.

The evidence not only showed that the aggregate charges are compensatory, but that the proportional rate to Kankakee was compensatory, and even to a greater degree than the reshipping rates from that point to Eastern destinations. For example, a study of a representative movement of 1101 cars shipped to Kankakee showed the average weighted distance to Kankakee was 39.21 miles,

average revenue per car, $66.07, and average revenue per car-mile, $1.68. For the through movement to all destinations, with an average weighted distance of 885 miles, the average revenue per car was $448.42, and average car-mile revenue, 50.69 cents. In other words, the proportional rate to Kankakee, although applied for only 4.4 per cent of the through distance, accounted for 14.7 per cent of the aggregate revenue. Other evidence consisted of comparisons with other rates, and the relative simplicity and economy of moving corn over the rural Kankakee branch. In approving a rate to Battle Creek, Mich., which yielded earnings of $70 per car, and 38 cents per car-mile, for the 184-mile movement there involved, the Commission, in *Corn Grits from Kankakee*, 237 I.C.C. 413, said of the movement over this branch and other lines of the New York Central that the rate applied

> "over a route of low traffic density, over which the traffic could be handled without additional train miles, as contrasted with the present joint rates from producing points in northern Illinois and Indiana to Battle Creek which apply over a longer route of high traffic density through Chicago * * *."

Evidence as to the same simple and economical operations in moving corn to Kankakee was introduced before the Commission in the case at bar.

If the statute required the Commission to scrutinize every segment of through transportation and every part of the through charges, it would be found in some instances that a given part of the service produced no revenue at all. For example, ex-barge corn that is shipped by rail from Chicago to Kankakee for subsequent movement to the East could be said to pay nothing extra for the 75-mile haul to Kankakee, as corn so shipped pays no more than

does all-rail corn reshipped from Kankakee to the same eastern point. The same would be true, of course, of all-rail corn reshipped from Kankakee to the East via Chicago, since the reshipping rate from Kankakee via Chicago and the reshipping rate from Chicago via Kankakee to the East are the same. The same situation prevails in the movement of ex-barge corn from Chicago via Milwaukee to an eastern destination, on the one hand, and from Milwaukee via Chicago on all-rail or ex-water corn to the same destination, on the other. For the movement from the intermediate point, the rail reshipping rate applies. For bringing the corn from the more remote reshipping point, the carriers receive no additional compensation.

The foregoing examples strikingly illustrate why, in a fourth section case, it is impossible to consider separately each segment of the through charge and the lack of merit in appellants' complaint (on p. 8) which deals only with the application of ex-barge rates from Chicago and disregards the analogous situation of all-rail grain reshipped from Kankakee. The reshipping rate applies in exactly the same manner from the intermediate point whether the movement is from Chicago via Kankakee or from Kankakee via Chicago.

Appellees Are Legally Entitled to Compete for Corn Grown Along the Kankakee Branch.

Appellants mistakenly assume that the Act to Regulate Commerce and the National Transportation Policy declared by Congress require rail carriers to withdraw from the competition for traffic in any area where water transportation is available. They argue that, as the barge movements end at Chicago and the railroads carry the corn to the East whether it reaches Chicago by barge or rail from the origin area involved, the railroad should

not be permitted to originate this grain (notwithstanding the proven urgent need of the Kankakee line for traffic) but instead all corn should be trucked to river elevators and transported thence to Chicago by barge. This contention, aside from its patent legal infirmity, overlooks the fact that only a fraction of the barged corn received in Chicago is shipped east by rail. It also moves east on the Great Lakes, and by rail in other directions.

Section 15a (3) of the Act provides that

> "* * * Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act." [49 U.S.C., Sec. 15a (3)]

The National Transportation Policy, 49 U.S.C., preceding Secs. 1, 301, 901 and 1001, states:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; * * * "

In *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282, 288, this Court said of the National Transportation Policy:

> "* * * The admonition does not mean that carriers by rail shall be required to maintain a rate that is too high for fear that through the change they may cut into the profits of carriers by water. The most that it can mean, unless, conceivably in circumstances of wanton or malicious injury, is that where carriers by land and water are brought within the range of the regulatory powers of the Commission, as *e.g.*, in establishing through routes or joint rates, there shall be impartial recognition and promotion of the interests of all."

In *Youngstown Sheet & Tube Company* v. *United States*, 7 F. Supp. 33, affirmed in 295 U.S. 476, the Court said at p. 38 of its opinion:

> " * * * we think the Commission confronted by two duties, not necessarily irreconcilable, one to promote water transportation and the other to preserve rail transportation, has performed both, when, within the zone of reasonableness, it has struck a just and proper balance between them. In determining this balance between the encouragement of the one and the preservation of the other form of transportation, the discretionary response to congressional mandate or admonition is, of course, that of the Commission, and not that of the court, and if recognition is given to each consideration that advantages the one or other, we cannot say that such discretion is abused, or that determination was arbitrary or capricious."

This Court also discussed the matter of competition between rail and water transportation in *Mechling* v. *United States*, 319 U.S. 671, saying at p. 691 of its decision:

> "The policy provisions of the Transportation Act of 1940, as well as the specific statutory provisions provide only standards of considerable generality and some overlapping. It requires administration to 'recognize and preserve the inherent advantages of each' rail, water and motor transport. It also seeks 'sound economic conditions' for all kinds of transportation."

Appellants' repeated reference to "cutthroat" competition is groundless and unwarranted. The amount of free corn moved by railroad from this origin area, following publication of the competitive rates, was shown to be approximately 13 per cent of the total handled therefrom by both barge and rail, excluding the export corn which moves at rates lower than those here involved. Yet, almost all of the corn grown along the NYC for shipment was, for many years, transported by rail until the canalization

and development of the Illinois River some 25 years ago resulted in its gradual diversion to the Waterway. The fact that these appellees and the railroads have been able to regain 13 per cent of the available traffic herein can scarcely, or appropriately, be characterized as "cutthroat" competition, particularly as river transportation of corn not only did not decline following establishment of competitive rail rates, but showed a substantial increase. The advantage of river movement is indicated, not only by the tremendously greater tonnage now moving by water than by rail from the origin area, but also by the fact that corn is trucked from, and through, shipping points on the Kankakee branch for long distances to the river in order to obtain the benefit of its substantially lower transportation charges.

Comparison of Corn Bids.

Appellants' comparison (pp. 9-10) of corn bids at "Missal, Illinois, on the Kankakee Belt Line and at Kernan, Illinois, port" is with unlike things, as the Commission points out in its report. Appellants sought to have the Commission disregard the cost of elevation service required to transfer corn from truck to car, but to take into account on the other hand the cost of such handling from truck to barge at the river. In the year preceding the publication of the reduced rates, 81 per cent of Kernan shipments had been trucked to the river, and 19 per cent moved by rail to all destinations. None of its traffic has been shipped over the Kankakee branch.

Appellants' Claims of Other Violations by Rail Carriers Are Irrelevant to the Fourth Section Proceeding and Without Basis in Fact or Law.

Appellants make numerous charges of violations of law resulting from the establishment of the railroads' competitive rates, but no attempt is made to point to any

facts, or the law governing them, to substantiate their contentions. We have already dealt with the contention that the proportional rate to Kankakee is non-compensatory, which is repeated a dozen times or more in appellants' Jurisdictional Statement. The claim of alleged discrimination on p. 13 of appellants' statement is answered in our motion to affirm in connection with the Jurisdictional Statement of the Board of Trade of Chicago. The reference to alleged competing elevators on other rail lines is likewise unfounded. Despite their proximity to appellees' elevators and the availability of the railroad's rates and shipping facilities, their traffic continues to be trucked to river elevators as it was in the period before these competitive rail rates were made effective.

CONCLUSION.

Appellants' Jurisdictional Statement has presented no substantial question that would warrant plenary consideration by this Court. In granting the carriers' application for fourth section relief, the Commission, based on ample evidence, found that the rates in question are reasonably compensatory; it made adequate and proper findings with respect to the lawfulness of the departure rates; and its ultimate finding is based on requisite findings supported by substantial evidence.

The attempt made by appellants to confine the Court's consideration here to a small segment of the through charges involved in the fourth section application is not only without legal basis, but its contentions are also without factual support in the record. The naked claims of discrimination and undue preference are in respect of issues not relevant in a hearing held solely on the railroads' fourth section application, and are not sustained by the evidence, as the rates apply equally and uniformly for all shippers and all communities.

Appellants' repeated insistence that the NYC (and with it these appellees) withdraw entirely from competition for their locally grown corn, so that it may move out by water, is unwarranted and completely disregards fundamental rights of these appellees.

The appeal herein presents no substantial issue that warrants plenary consideration, and the judgment of the Court below should therefore be affirmed.

Respectfully submitted,

Leo P. Day,
Attorney for McNabb Grain Company, and Others.

PROOF OF SERVICE

I, LEO P. DAY, Attorney for Defendants-Appellees McNabb Grain Company and others, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 5th day of Mareh, 1963, I served copies of the foregoing Motion to Affirm of the Defendants-Appellees McNabb Grain Company and others on the several parties by mailing copies thereof in duly addressed envelopes with postage prepaid as follows:

1. On the Appellant, Board of Trade of the City of Chicago, copies to its attorneys Harold E. Spencer, Esq., and Richard M. Freeman, Esq., One North LaSalle Street, Chicago 2, Illinois.

2. On the Plaintiffs-Appellants, A. L. Mechling Barge Lines, Inc., Ira Bookwalter, Cullom Cooperative Grain Company, Charles Treasure, Griswold Grain Company, and Mazon Farmers Elevator, copies to their attorneys Edward B. Hayes, Esq., and Wilbur S. Legg, Esq., 135 South LaSalle Street, Chicago 3, Illinois.

3. On the Appellee, United States of America, copies to the Honorable Archibald Cox, Solicitor General of the United States, Department of Justice, Washington 25, D.C., and to James P. O'Brien, Esq., United States Attorney for the Northern District of Illinois, Room 450 United States Court House, Chicago, Illinois.

4. On the Appellee, Interstate Commerce Commission, copies to Robert W. Ginnane, Esq., its General Counsel, and H. Neil Garson, Esq., its Associate General Counsel, Washington 25, D.C.

5. On the Appellee, The New York Central Railroad Company, copies to its attorney Richard J. Murphy, Esq., Room 1225 LaSalle Street Station, Chicago 5, Illinois.

LEO P. DAY